it results that we are of opinion that, under the facts of this case as now disclosed, the appellees could maintain their suit without having first procured a certificate from the engineer in charge, certifying in writing the final completion of their contract and a final estimate showing the balance due.

Upon the whole case we are of opinion that there is no error in the decree of the circuit court, which is affirmed.

Affirmed.

CARDWELL, J., absent.

DAVIS v. MARSHALL.

Nov. 21, 1912.

[76 S. E. 316.]

1. **Equity (§ 331*)—Pleading—Waiver of Error—Amendment of Bill.**—A complainant who, by leave of court, files an amended bill after a demurrer to the original bill is sustained, acquiesces in the court's action upon the demurrer, and cannot afterwards assign error thereon.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 331.*]

2. **Principal and Agent (§ 78*)—Accounting.**—While equity may adjust accounts between principal and agent at the suit of a principal against the agent where confidence is reposed in the latter, as a general rule, a bill for an accounting by an agent will not lie against his principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 162-177; Dec. Dig. § 78.*]

3. **Pleading (§ 8*)—Sufficiency of Allegations—Facts or Conclusions.**—Even if the bill showed an exceptional case justifying the allowance of an accounting in a suit by an agent against his principal, bare allegations that there are many items of mutual, current, and in some instances confused, accounts existing between them as principal and agent did not sufficiently allege facts to authorize such an accounting.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

4. **Account (§ 1*)—Grounds—Loss of Account Books.**—While equity has jurisdiction to grant relief in cases of lost deeds and certain other instruments, the loss or destruction of account books or of items of accounts is not of itself a ground of equity jurisdiction to compel an accounting.

[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 1-8; Dec. Dig. § 1.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

Appeal from Circuit Court, Rockingham County.

Suit by John A. Davis against Wm. H. Marshall. From a judgment dismissing the bill, complainant appeals. Affirmed.

The appellant, who was the complainant in the circuit court, brought suit against the appellee for a settlement of accounts alleged to exist between them, and for a full disclosure on the part of the appellee of all the transactions in relation thereto. There was a demurrer to the bill, which was sustained, upon the grounds (1) that its allegations were so vague and indefinite as not to sufficiently apprise the defendant of the claims which the complainant would assert against him; (2) that the bill was multifarious, in that it sought in part a settlement of accounts between principal and agent, and also a settlement of other accounts between them; and (3) that the bill, so far as it sought a settlement of accounts between agent and principal—the complainant being agent and the defendant principal—it could not be maintained upon its allegations.

Leave was given the complainant to file an amended bill. In giving such leave the court stated that: "Inasmuch as the last stated objection to the bill and the ruling of the court thereon has the effect of removing out of the case one of the objects of the bill, and of eliminating the objection of multifariousness, if complainant desires to amend by eliminating that feature and will also amend as to the other feature of the bill so as to make its object and claim plain and its allegations reasonably definite, and such that the defendant can answer them, the court will consider the question of whether the bill can be entertained."

The complainant filed an amended bill, which is as follows:

"Humbly complaining, your orator, John A. Davis of Rockingham county, brings this his amended bill of complaint, and respectfully shows the court that at the first July rules, 1910, he filed his original bill in this cause, as appears from the record thereof, to which bill the defendant, William H. Marshall, appeared and filed his demurrer, specifying the grounds in writing, whereupon such proceedings were had that at the November term, 1910, the said court sustained the demurrer to said bill, as appears from the order entered in this cause, with leave to your complainant to file an amended bill within 15 days from the rising of the court, and your complainant now avers and charges.

"That your complainant in the year 1890 was placed in charge of the mill owned by said Marshall, known as the 'River Bank Mill,' which is situate on the Shenandoah river in the eastern part of said county, under an oral agreement with said Marshall to the effect that your complainant, as the agent of said Marshall, should take possession and manage the same for him, the

said Marshall to furnish all money and supplies and whatever was necessary to operate said mill, and your complainant to have full charge of the receipts and disbursements of the money and supplies, and to receive for his services the sum of $400 per year. That the said Marshall failed to furnish the supplies and funds necessary to operate said mill, and your complainant, at the instance of said Marshall, put into said business about $500 shortly after the commencement of the business, and thereafter from time to time various sums of money, ranging from $12 up, and at the same time indorsing various and sundry notes for said Marshall.

"That the said Marshall was the owner of another flour mill at Elkton, in said county, known as 'Marshall's Mill,' and was operating the same, and on many and numerous occasions would receive flour and other mill products, flour barrels, and money from the mill operated by your complainant, and during said period your complainant would likewise receive flour and other mill products, flour barrels, and money from Marshall at the mill operated by him, and during said period the said Davis, from time to time, received from and paid to others, on account of said Marshall, various sums of money, and the said Marshall would receive from and pay to others various sums of money on account of said complainant. That the items of account from the year 1890 to the year 1899 were destroyed by fire which occurred in the 'River Bank Mill,' and only the balances carried forward to the then current account books are now in existence. Since the items of account for about the first eight years, from 1890 to 1899, are lost and destroyed as aforesaid, and cannot be reproduced by your complainant as required on the law side of the court to be filed with, or set out in, the declaration, therefore your complainant's remedy on the law side of the court would be inadequate and incomplete.

"Conplainant further shows your honor that in the year 1900 the business in which complainant and defendant were engaged as aforesaid was changed by a mutual oral agreement to the extent that the said 'River Bank Mill' was thereafter known as the 'Davis Mill,' and was managed and operated in the name of complainant, instead of in the name of Marshall by Davis, his agent. It was expressly and mutually understood and agreed, however, between complainant and defendant, at the time said change was made, that said Davis continued to be the agent of said Marshall and should account to him as such, and the said mill is thus operated to-day. The amount that complainant was to receive for his services from 1900 to 1910 was not fixed by the agreement, as aforesaid, and is yet open and undetermined.

"Your complainant is advised, and charges, that said transac-

tions have continued from the year 1890 to the present time in which there are many items of mutual current, and in some instances confused, accounts, of the character hereinabove indicated, between the said Marshall and your complainant, his agent, which agency has continued from the year 1890 to the present.

"Your complainant is desirous of having a complete and full settlement of all matters between him and said Marshall on account of the matters and things aforesaid, and avers and charges that, in order to obtain a settlement of said accounts, there should be a disclosure of the items of money, goods, and supplies, and mill products by complainant and defendant, respectively, and especially a disclosure on the part of Marshall of the money, materials, supplies, and mill products with which the complainant has been charged by said Marshall.

"Your complainant further avers and charges that upon a settlement of said mutual, current, and running account between complainant and defendant there will be due the complainant at least the sum of $4,000 exclusive of interest.

"In consideration of the premises, and inasmuch as your complainant is remediless save in a court of equity, where matters of this sort are alone and properly cognizable, your complainant prays that said William H. Marshall, defendant hereto, be required to answer this amended bill, answer under oath being waived, that all proper accounts of the aforesaid mutual transactions between your complainant and said Marshall be taken, that said Marshall be required to make a full disclosure of the items of his account, that your complainant may have a decree for any balance found to be due him against said Marshall, and that your complainant may have such further and general relief as the nature of the case may require or to equity may seem meet, and, as in duty bound, he will ever pray," etc.

To this amended bill there was a demurrer, which was sustained by the court and the bill dismissed. From that action of the court this appeal was granted.

Geo. S. Harnsberger and *Sipe & Harris,* all of Harrisonburg, for appellant.

C. D. Harrison and *Conrad & Conrad,* all of Harrisonburg, for appellee.

BUCHANAN, J. (after stating the facts as above). Error is assigned to the action of the court in sustaining the demurrer to the original as well as the demurrer to the amended bill.

[1] No assignment of error can be considered here as to the action of the trial court in sustaining the demurrer to the original bill. Where a party, after a decree sustaining a demurrer to his bill, by leave of the court files an amended bill, he is consid-

ered to have acquiesced in the action of the court upon the demurrer, and will not be permitted to assign such action as error in the appellate court. This is the rule in this state, and generally, it seems. Fudge v. Payne, 86 Va. 303, 307, 308, 10 S. E. 7. See 2 Cyc. 645; 4 Am. & Eng. Enc. of Law & Practice, 96; 1 Enc. Pl. & Pr. 624, and cases cited in notes.

The only question, therefore, to be considered is whether or not the trial court erred in sustaining the demurrer to the amended bill.

That bill, as we construe it in the light of the order of the court giving leave to file it, is for the settlement of accounts between the complainant and the defendant which had been running from the year 1890 to the institution of this suit in the year 1911. During that period the amended bill alleges that the complainant was the agent of the defendant in operating a mill owned by the latter.

[2] It is well settled that a court of equity, under its general jurisdiction for the enforcement of trusts, has jurisdiction to settle and adjust accounts between principal and agent at the suit of the principal against his agent, where confidence is reposed in him by the principal. Adams' Equity, s. p. 220, 221; Berkshire v. Evans, 4 Leigh (31 Va.) 223; Zetelle v. Myers, 19 Grat. (60 Va.) 62; Coffman v. Sangston, 21 Grat. (62 Va.) 263; Thornton v. Thornton, 31 Grat. (72 Va.) 212; Simmons v. Simmons, 33 Grat. (74 Va.) 451-456.

But while the principal has the right to come into a court of equity under the circumstances indicated, and sometimes under other circumstances, it seems to be equally well settled that a bill for an account by an agent against his principal will not generally lie.

Adams, in his work on Equity, side page 221, after stating the general doctrine as to the right of a principal to invoke the aid of a court of equity to compel his agent to account, states that: "It obviously follows from this doctrine that a bill for an account by an agent against his principal will not generally lie; for it is the agent's duty, and not the principal's to keep the account."

In a note to section 1421, 4 Pom. Eq. Jur., where the circumstances under which a principal may file a bill for an account against his agent are discussed, it is said that, while the rules there laid down are well settled in favor of the principal, it does not follow that the reverse is true, and that an agent may come into equity for an account against his principal, since generally there is no trust or confidence reposed in the latter, and no duty on his part to account—citing Padwick v. Stanley, 9 Hare, 627, and Smith v. Levaux, 2 De G. J. & S. 1.

In Adams' Equity, p. 221, it is said that there is a special exception to the general rule above stated in the case of a steward, the nature of whose employment is such that money is often paid in confidence without vouchers, embracing a variety of accounts with tenants, so that it would be impossible to do justice without an account in equity.

In Smith *v.* Levaux, 2 De G. J. & S. 1, it was held that a bill for an account would lie on behalf of an agent against his principal who has received certain sums upon which the former was entitled to a commission, and also, it is said, where the agent's salary depends upon the profits made by his employer. See Harrington *v.* Churchwood, 6 Jur. (N. S.) 576; Shepperd *v.* Brown, 4 Giff. 208.

[3] The appellant, under the general rule, not being entitled to file a bill against his principal for an accounting, his amended bill was demurrable, unless it contained such allegations of fact as would bring him within some exception to that rule. It is alleged that there are many items of mutual current, and in some instances confused, accounts between them as principal and agent. But, even if an agent could maintain a bill against his principal on that ground, it would be necessary to allege facts which show the existence of such ground. The general allegation alone is not sufficient.

Not only does the bill fail to allege such facts, but the appellant does not exhibit his account or any part of it with his bill.

In Hickman *v.* Stout, 2 Leigh (29 Va.) 6, 9, in which a demurrer to a bill for accounting was overruled, Judge Carr, speaking for the court, said: "The bill states mutual accounts between the parties, running through a series of years, and consisting of numerous items of blacksmith's work on the one hand, and on the other of various articles of country produce delivered, such as wood, coal, hay, wheat, potatoes, of money paid at different times, of work done with wagons, etc. When I speak of the bill, I consider the account filed with it as a part of it."

If such a showing by the bill was deemed necessary, as seems to have been thought in that case, which was a suit between parties where one was no more under obligation than the other to keep their accounts, a fortiori, such a showing at least should be required where, as in this case, it was the duty of the complainant to keep and render accounts to his principal.

[4] It is true the amended bill alleges "that the items of account from the year 1890 to the year 1899 were destroyed by fire in the mill operated by the appellant, and that only the balances for these years as carried forward on current account books are now in existence, and that such items cannot be reproduced by the appellant as a ground of equity jurisdiction." While a court

of equity has jurisdiction to set up and give relief in cases of lost deeds and bonds, and lost negotiable instruments in certain cases (Adams' Eq., s. pp. 167, 168; Shields *v.* Commonwealth, 4 Rand. [25 Va.] 541, 545; Taliaferro *v.* Foote, 3 Leigh [30 Va.] 58), the loss or destruction of account books or of items of account is not of itself a ground of equity jurisdiction.

The court is of opinion that the allegations of the amended bill are not sufficient to take the case out of the general rule that an agent cannot file a bill against his principal for an accounting, and therefore that the trial court did not err in sustaining the demurrer to it.

Affirmed.

Note.

Right of Agent to Accounting against Principal.—While the general rule is as stated in the above opinion, yet some decisions in this country would seem to imply that such bill might lie by an agent for the recovery of his commissions, where the amount to which the agent was entitled is uncertain, as depending on the value of profits made by the principal, and the account is too complicated to be gone into at law. Badger *v.* McNamara, 123 Mass. 117, Haskins *v.* Burr, 106 Mass. 48.

Right of Agent to File Cross Bills.—Where the object of a bill in equity is to secure an accounting of a terminated agency, the agreement for which agency contemplated that the agent should be paid for his services, it is proper for the defendant agent, by cross bill, to demand payment for his services and have such demand adjusted with the accounting, so that by its decree the court may give complete relief between the parties in respect of the agency. Van Voorhis Hutchinson, 54 N. J. Eq. (9 Dick.) 439, 35 Atl. 371.

So, also, in Clark *v.* Lee, 21 Iowa 274, it was held that the principal having taken agent into court of equity charging him with misappropriations of money, misconduct, etc., and asking specific and general relief against him, it was entirely competent and proper to allow all matters relating to the accounts and transactions of the agent to be adjudicated in one and the same suit, and the answer of the agent was allowed to be so amended as to pray for an account to be taken of the matter pertaining to his trust and agency.